Filed 6/22/16 Bryden v. Verizon Calif. Inc. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HEATHER BRYDEN et al., Plaintiffs and Respondents, v. VERIZON CALIFORNIA INC., Defendant and Appellant.	A143506 (San Francisco City & County Super. Ct. No. CGC-11-511467) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed May 31, 2016, be modified as follows:

1. On page 4, the first sentence of the second paragraph under the heading "***The Lawsuit***" should be modified to read as follows:

The class alleged, in paragraphs 3, 4, and 27, it was suing over late fees Verizon imposed in connection with residential telephone services under the authority of applicable agreements and incorporated tariff documents.

There is no change in the judgment.

The petition for rehearing is denied.

Dated:

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Humes, P. J.

Filed 5/31/16 Bryden v. Verizon Calif. Inc. CA1/1 (unmodified version)

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Heather Bryden and others have sued Verizon California, Inc. (Verizon) in a class action, alleging the company charged illegal late fees to residential landline customers. Verizon petitioned to compel arbitration of Bryden's claims based on two agreements with arbitration provisions: (1) a "Product Guide" governing long-distance telephone service and (2) the terms of use governing high-speed Internet service. The trial court denied arbitration, ruling Bryden never accepted the arbitration provision in the Product Guide and the arbitration provision in the Internet terms was added after her claims accrued and should not apply retroactively. On appeal, Verizon does not take issue with the ruling as to the Product Guide, but asserts arbitration is still required by the Internet terms, alone. We conclude the Internet terms do not provide a basis for compelling arbitration of the dispute over telephone service fees and therefore affirm.

BACKGROUND

Bryden, from 2005 until at least 2013, used long-distance telephone and Internet services provided by various Verizon-branded entities. These services were "bundled"

and charged to her on one monthly bill, which she received from defendant Verizon. Nonetheless, separate agreements, with separate corporate affiliates, furnished the terms and conditions associated with each service.

Long Distance

Bryden's long-distance service was governed by a Service Agreement and a Calling Plan (alternatively called the Product Guide) issued by Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance. The Service Agreement was sent to new customers as standard business practice. The Agreement incorporates the Product Guide, a document available upon request. Further information about the Agreement and Guide, customers are informed, can be found on a particular Web page.

The Product Guide has been revised over time, but all relevant versions have included a paragraph titled "Alternative Dispute Resolution (ADR)." That paragraph recites an agreement "to resolve disputes arising out of services provisioned pursuant to the Service Agreement without litigation," and in most cases, by alternative dispute resolution procedures including, if resolution is not otherwise possible, binding arbitration.

Verizon typically retains copies of initial customer mailings for only six months. It has no copy of the mailing, presumably including the Service Agreement, sent to Bryden in 2005. Nor is there any other evidence Verizon sent, or Bryden received, any initial mailing.

Internet

Bryden's high-speed Internet service was governed by Verizon Internet Access Terms of Service, issued initially by GTE Net LLC d/b/a Verizon Internet Solutions and later by Verizon Online LLC (individually or collectively, Verizon Online). During installation of software for the service, a window appeared on Bryden's computer showing the then-current version of the Internet terms, and Bryden placed a mark next to a statement affirming she had read and agreed to them.

The Internet terms in 2005 had no arbitration provision. In fact, they required disputes concerning the agreement to be brought in court in Fairfax County, Virginia and stated the law of Virginia would govern.

The terms also had a paragraph six, titled "REVISIONS." It provided Verizon Online "may revise the terms and conditions of this Agreement from time to time . . . by posting such revisions to" its Web site. It would be the user's responsibility to "visit . . . periodically" to become "aware of and review any such revisions." Increases to price would take effect 30 days after posting. Other revisions would "be effective upon posting." Continued use of Verizon Online's Internet service "after revisions are in effect" would constitute agreement to them. If the user disagrees with revisions, the user must terminate use of the service.

Several years after Bryden set up her Internet account, Verizon Online, in February 2008, revised its Internet terms to allow future revisions to be made by postings to its Web site, as before, or by e-mail. Revisions would be effective on the date noted in the posting or e-mail. Again, there was no arbitration provision and disputes were to be settled in Fairfax County, Virginia under Virginia law.

In December 2011, Verizon Online revised its Internet terms again, this time adding an arbitration provision. Bryden was notified of these changes by e-mail on June 20, 2012 and in her July 2012 bill.

This version of the terms, the current one, provides:

> "[A]NY DISPUTE THAT IN ANY WAY RELATES TO OR ARISES OUT OF THIS AGREEMENT OR FROM ANY EQUIPMENT, PRODUCTS AND SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY SUCH PRODUCTS OR SERVICES) WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ('AAA') OR BETTER BUSINESS BUREAU ('BBB') . . . ."

The Internet terms now also state that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the substantive law of the state of the subscriber's billing address apply to disputes.

The change notifications by e-mail and bill informed Bryden the Internet terms "now require that you and Verizon resolve disputes only by arbitration or in small claims court." Though not directly applicable to Bryden, the e-mail also told subscribers if they had agreed to a long-term contract with early termination fees, the arbitration provisions would not take effect until after the term of that contract.

All three versions of the Internet terms have an integration clause specifying the version is the "entire agreement" and "supersedes any and all prior or contemporaneous agreements."

The Lawsuit

On June 3, 2011, Deanna Gastelum, on her own behalf and on behalf of those similarly situated, filed a class action complaint against Verizon, asserting certain late fees were unlawful penalties under Civil Code section 1671 and violated California's Unfair Competition Law (Bus. Prof. Code, § 17200 et seq.) and Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.). Bryden was added as a second named plaintiff in the March 2014 Third Amended Complaint.

The class alleged, in paragraphs 3, 4, and 27, it was suing over late fees Verizon imposed in connection with residential telephone services under the authority of the long-distance Product Guide and related tariff documents. Verizon allegedly charged residential telephone customers a monthly late fee if they had overdue balances over $20. The fee was $2.50 or 1.5 percent of the balance, whichever was greater.[1] The class

[1] The record suggests that, in actuality, the $2.50 flat fee was never applicable to long-distance service as the parties describe. The "Payment for Service" paragraph in both included Product Guides, for instance, states a late fee would be the *lower* of (1) 1.5 percent, the maximum allowed by law, or the amount charged by the local exchange carrier. If the local exchange carrier was indeed threatening a $2.50 flat fee or 1.5

would consist of "[a]ll persons with a California area code who . . . received residential landline telephone service from Verizon . . . and who were billed" the challenged late fees and paid them.

Bryden, in particular, challenged the telephone late fees imposed on her Verizon account between December 1, 2008 and the initial filing of the lawsuit, in June 2011.

Nowhere does the complaint mention the Internet terms or fees related to Internet services.

Arbitration

Verizon petitioned to compel arbitration of Bryden's dispute based on the Product Guide and the Internet terms, both of which, as discussed, contained arbitration clauses as of the time Verizon sought to compel arbitration.

The trial court denied Verizon's petition. It concluded there was no evidence Bryden ever received or agreed to the long-distance Product Guide, therefore that agreement could not provide a basis for arbitration. As for the Internet terms, because this agreement did not contain an arbitration clause until many years after Bryden first subscribed, the court concluded it should not apply retroactively and therefore also could not provide a basis for compelling arbitration.

Verizon timely appealed, but it expressly does not challenge the trial court's ruling regarding the long-distance Product Guide. Its sole argument on appeal is that the Internet terms, alone, compel arbitration.

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percent, whichever was *greater*, the $2.50 flat fee would be overridden when the 1.5 percent figure called for in the Product Guides was less than $2.50. If the 1.5 percent figure ever exceeded $2.50, the local exchange amount would equal the 1.5 percent amount in the Product Guides. Thus, it appears the late fee called for in the Product Guides would, in all circumstances, simply be 1.5 percent of the overdue balance.

DISCUSSION

The parties' briefs mainly address whether the newly-added arbitration clause in the current version of the Internet terms can retroactively require arbitration of Bryden's claims—claims arising from late fees imposed before the arbitration clause was added.

The trial court, as noted above, rejected retroactive application of the clause. Indeed, even when contracts authorize unilateral changes to terms, changes by one contracting party without fair warning and clarity to the other—such as imposition of a supposedly retroactive term without making its retroactive nature clear—may upset the parties' expectations and pose a serious concern that the contract is illusory. (Compare *Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 965–968 [arbitration clause added to bylaws not given retroactive effect when silent on the matter, despite policy favoring arbitration; to do otherwise would violate the covenant of good faith and fair dealing], & *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 61 [employer cannot modify arbitration clause to affect accrued or pending claims without violating the covenant of good faith and fair dealing]; with *Du Frene v. Kaiser Steel Corp.* (1964) 231 Cal.App.2d 452, 458 [retroactive effect given when amendment explicitly retroactive]; see also *Security Watch, Inc. v. Sentinel Systems, Inc.* (6th Cir. 1999) 176 F.3d 369, 373 [arbitration clause in essentially forward-looking agreement not read as retroactive]; *Hendrick v. Brown & Root, Inc.* (E.D. Va. 1999) 50 F.Supp.2d 527, 535 but see *Levin v. Alms and Associates, Inc.* (4th Cir. 2011) 634 F.3d 260, 267–268 [ambiguous arbitration clause interpreted to include past disputes].)

In reviewing this case, however, we discerned a more fundamental concern with Verizon's continuing efforts to compel arbitration. Bryden's lawsuit concerns only telephone late fees, but Verizon no longer seeks arbitration on the basis of the long-distance Product Guide. Instead, Verizon relies exclusively on the Internet terms, yet those expressly exclude "voice telephony services" from their ambit. Recognizing our obligation to affirm the trial court's denial of arbitration if correct on any ground (see

Imburgia v. DIRECTV, Inc. (2014) 225 Cal.App.4th 338, 342, rev'd on other grounds *DIRECTV, Inc. v. Imburgia* (2015) __ U.S. __ [136 S.Ct. 463, 466–467]; *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32), we asked the parties to address whether and how the Internet terms bear on the arbitrability of claims related to residential landline services.

Bryden confirmed in her supplemental briefing that she seeks only late fees related to telephone service, and she maintains the arbitration clause in the Internet terms does not apply.

Verizon, on the other hand, argues Bryden seeks to recover all late fees, including those related to Internet services, and the Internet terms and its newly-added arbitration clause do apply. Verizon notes Bryden never contested the relevancy of the Internet terms in the trial court. And while Verizon acknowledges each service, telephone and Internet, was governed by a separate agreement, it argues only a single, combined late fee charge was levied for all services in a combined bill. Verizon contends this charge was overwhelmingly based on Bryden's failure to pay for Internet service, and that in many months, Bryden's telephone charges were too small to trigger any late fees. If the only charged late fee "relates" to Internet service, surely, argues Verizon, Bryden's lawsuit relates to the Internet service and the Internet terms.

We do not accept Verizon's characterization of Bryden's claims. The third amended complaint defines the disputed "Late Fees" as consisting only of those charges related to residential telephone agreements. Internet service and Internet charges are never mentioned. Moreover, Bryden's supplemental briefing to this court confirms the limitations of her claims: "The claims Bryden pleaded below relate *only* to the Bryden Late Fees—i.e., to late payment charges 'provided for' in the Agreement under which Verizon California offered *detariffed* residential landline services."

When multiple contracts govern the relationship between two parties, an arbitration clause in one contract does not compel arbitration of a dispute related to or

arising from another. (*Nestle Waters North America, Inc. v. Bollman* (6th Cir. 2007) 505 F.3d 498, 504 ["In the context of multiple contracts, this court has adopted a more narrow test of arbitrability, examining which agreement 'determines the scope of' the contested obligations. We have rejected the view that a dispute is arbitrable merely because it 'touch[es] matters covered by' the arbitration clause."]; *Alticor, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (6th Cir. 2005) 411 F.3d 669, 672 ["Although this arbitration provision may appear broad because of its coverage of 'all' disputes 'relating to' the Premium Payment Agreement, it also is narrow because of its limitation to that Agreement . . . ."]; *International Underwriters AG & Liberty Re-Insurance Corp. v. Triple I: International Investments, Inc.* (11th Cir. 2008) 533 F.3d 1342, 1346 ["When an arbitration clause in one agreement does not apply to claims arising from or related to a different agreement, we have not required arbitration."]; cf. *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 413–414 ["the trial court abused its discretion in essentially binding the mediation franchisees to the terms of an arbitration agreement that they never signed"].)

Here, Bryden's lawsuit concerns only telephone service late fees. There simply is no dispute about the imposition of late fees related to the Internet service and no dispute regarding the meaning or legality of the Internet terms. Thus, what the Internet terms say about late fees is irrelevant to Bryden's claims.

That Verizon chose to send Bryden a single bill for both telephone and Internet services does not change the fact they were separate services, governed by separate agreements. In short, Verizon's unilateral practice of charging a single late fee for bundled services governed by different contracts cannot force Bryden to arbitrate claims over fees for one service, telephone, because another service, Internet, has terms arguably requiring arbitration.

DISPOSITION

The trial court's order denying the petition to compel arbitration is affirmed. Respondents are awarded costs on appeal.[2]

[2] Respondents' request for judicial notice is hereby denied.

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Banke, J.

We concur:

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Humes, P. J.

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Margulies, J.

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